Supreme Court, U.S.
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No. 94-1249

In The

Supreme Court of the United States

October Term, 1994

DRUG EMPORIUM, INC.,

vs.

Petitioner,

PARFUMS GIVENCHY, INC.,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* COSTCO WHOLESALE CORPORATION, THE PRICE COMPANY, NATIONAL ASSOCIATION OF CHAIN DRUG STORES, INTERNATIONAL MASS RETAIL ASSOCIATION, AND NATIONAL ASSOCIATION OF CATALOG SHOWROOM MERCHANDISERS IN SUPPORT OF PETITIONER

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Costco Wholesale Corporation ("Costco"), The Price Company ("Price Club"), the National Association of Chain Drug Stores ("NACDS"), the International Mass Retail Association ("IMRA") and the National Association of Catalog Showroom Merchandisers ("NACSM") are submitting this joint brief *amici curiae* in support of petitioner. Consents from petitioner and respondent are being filed separately with the Court.

INTEREST OF *AMICI CURIAE*

1. Costco & Price Club. Costco and Price Club[1] operate "Costco Wholesale" and "Price Club" membership warehouse clubs across the United States and Canada and in certain other countries. Costco and Price Club members represent more than 10 million households in the United States. Price Club's and Costco's annual U.S. sales are approximately $14 billion. With a minimalist cost structure, Price Club and Costco sell brand name goods at extremely low prices. These include imported goods that have copyrighted label designs or features.

In the past 18 months, Costco and Price Club have been sued several times under § 602(a) of the Copyright Act in the same district court in which this case arose.[2] In one of these lawsuits, the plaintiffs selected a forum in the Ninth Circuit over an available venue in the Third Circuit, where they had their principal U.S. offices. *See infra* at A-3 ¶ 2. In two other consolidated lawsuits, Price Club and Costco have stipulated to a judgment that may be vacated *inter alia* if this Court changes Ninth Circuit law regarding § 602(a) and the first sale doctrine. *See infra* at A-6, ¶ 9(a). Each of the lawsuits involves goods first sold by the copyright owner itself (or its affiliate) and imported by persons other than Costco and Price Club. The present case will directly affect the outcome of all of those lawsuits.

2. NACDS, IMRA and NACSM. The NACDS is a national association of retail chain drug stores. It has 134 members that operate 21,186 retail outlets throughout the United States representing over $60 billion in sales. *See infra* at A-8.

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[1] Costco and Price Club are wholly owned subsidiaries of Price/Costco, Inc., whose shares are publicly traded.

[2] *Disenos Artisticos, Etc. v. Costco Wholesale Corp.*, C.D. Cal. No. 93-7061 RAP (Judgment Jan. 13, 1995), *appeal pending*, 9th Cir. Nos. 95-55018 & 95-55106; *Swarovski America Ltd. v. Price/Costco Inc. et al.* and *Swarovski America Ltd. v. Costco Wholesale Corp.*, C.D. Cal. Nos. 93-6365 SVW, 93-7403 SVW (Judgment Dec. 21, 1994); *L'anza Research Int'l, Inc. v. Costco Wholesale Corp. et al.*, C.D. Cal. No. 95-0244 TJH (filed Jan. 12, 1995).

The IMRA represents 170 mass retail chains, including discount department stores, home centers, catalog showrooms, dollar stores, variety stores, warehouse clubs, deep discount drugstores, specialty discounters and off-price stores. Collectively, IMRA retail members operate more than 54,000 stores in the United States and abroad, employ over one million people, and account for the majority of the $245 billion U.S. mass retail industry.

The NACSM is an association of catalog showroom merchandisers, whose members use catalogs showing brand name products as a principal medium of advertising. It represents approximately 2,000 discount retail stores which do approximately $8 billion in annual sales.

All three associations advocate the freedom of their members to purchase and resell genuine brand name products, to make available any such product at low prices, and thereby to compete freely with other forms of retailing. The Ninth Circuit's decision in this case presents a substantial threat to that freedom. If the decision goes unreviewed, retailer members of the NACDS, IMRA and NACSM will face a substantial restriction on their ability to purchase and resell genuine goods, affecting billions of dollars of commerce (and consumer access to the benefits of open competition).

SUMMARY OF ARGUMENT

I. This case concerns an ambiguity in the relationship between two important provisions of the Copyright Act, sections 109(a) and 602(a). Section 602(a) provides that importation of copyrighted material "without authority of the owner of copyright" is an infringement of the copyright owner's distribution rights under § 106(3). 17 U.S.C. § 602(a). Section 109(a), however, states that "notwithstanding the provisions of § 106(3)," a copyright owner may not control the disposition of a particular

copy after he or she first sells it, and that purchasers "without the authority of the copyright owner [may] sell or otherwise dispose of the possession of that copy." 17 U.S.C. § 109(a).

The statutory language does not clearly state how these provisions are to be reconciled. In this case, the Ninth Circuit chose an expansive reading of a copyright owner's right to control imports under § 602(a). It ruled that a copyright owner, having sold ordinary goods (perfume) outside the United States with a copyrighted design on the package, may sue a retailer that purchased these same goods after they had been imported by someone else. The first sale doctrine in § 109(a) was held not to apply.

This result is contrary to past rulings of this Court that statutory monopolies under the patent and copyright laws be "strictly construed." *Sears Roebuck & Co. v. Stiffel Co.,* 376 U.S. 225, 230 (1964) (patent). A court may not "enlarge the scope of respondents' statutory monopolies . . . beyond the limits of the grants authorized by Congress." *Sony Corp. v. Universal City Studios, Inc.,* 464 U.S. 417, 421 (1984) (copyright). Normally, courts must construe an ambiguity, like the one here, in favor of preserving free competition and against enlarging patent or copyright monopolies. *Deepsouth Packing Co. v. Laitram Corp.,* 406 U.S. 518, 530-31 (1972). The Ninth Circuit's failure to follow these principles presents an additional reason for granting the petition.

II. The two questions presented in the petition require a uniform national rule. Because of the effect on commerce, we need "to have national uniformity in patent and copyright laws." *Sears, Roebuck & Co.,* 376 U.S. at 231 n.7. Lack of uniformity between the law in the Ninth and Third Circuits exposes innocent retailers to significant liability, affects merchandise stocking decisions, chills ordinary commercial transactions in goods with some copyrighted feature or label, imposes costs and higher prices on consumers, and limits competition — all without a clear expression from Congress.

ARGUMENT

I. ENLARGING A STATUTORY MONOPOLY TO RESOLVE AN AMBIGUITY IN THE COPYRIGHT ACT IS CONTRARY TO THIS COURT'S PAST DECISIONS

Petitioner correctly notes that a direct conflict exists here between the Ninth and Third Circuits. The Ninth Circuit below held that "sales *abroad* do not constitute a defense to copyright infringement under § 602(a)" and that "the relationship between the copyright holder and the seller abroad is irrelevant." *Parfums Givenchy, Inc. v. Drug Emporium, Inc.*, 38 F.3d 477, 483 (9th Cir. 1994), Pet. App. 12 n.9 (emphasis in text). By contrast, the Third Circuit has ruled that "the place of sale is not the critical factor in determining whether section 602(a) governs" and that "a first sale by the copyright owner extinguishes any right later to control importation of those copies." *Sebastian Int'l, Inc. v. Consumer Contacts (PTY) Ltd.*, 847 F.2d 1093, 1099 (3d Cir. 1988), Pet. App. 49. Like the present case, *Sebastian* involved a situation in which "the 'first sale' of the products [did] not occur in the United States." Pet. App. 49 n.2.

The petition also correctly describes conflicts in the rationales followed by the two courts of appeal. Pet. 8-12. *Amici* submit that these conflicts reveal an additional reason for granting the petition: the Ninth Circuit's divergence from the Third Circuit enlarges the statutory monopoly in the context of an unclear statutory scheme. The appellate court decided "a federal question in a way that conflicts with applicable decisions of this Court" regarding the scope of statutory monopolies. Rule 10.1(c).

A. Nature of the Statutory Ambiguity.

The texts of §§ 109(a) and 602(a) do not state how these two provisions are to be reconciled. Neither section refers directly to the other.[3] Both the Third and Ninth Circuits agree that there is an ambiguity. *Givenchy,* Pet. App. 7 ("[T]here are at least two plausible interpretations"); *Sebastian,* Pet. App. 45 ("[T]he interrelationship between sections 602(a) and 109(a) may be interpreted in two possible ways").

While the statutory text does not conclusively resolve the issue, it does indicate a path contrary to that taken by the Ninth Circuit. Section 602(a) purports only to describe conduct that "is an infringement of the exclusive right to distribute . . . under section 106." 17 U.S.C. § 602(a). If § 602(a) simply defines a type of infringement of a § 106 right — specifically, the exclusive right to distribute under § 106(3) — it is subject to the first sale doctrine of § 109. Section 106 makes all exclusive rights of a copyright owner "subject to sections 107 through 120," including § 109. 17 U.S.C. § 106. Similarly, § 109(a) expressly applies, "notwithstanding the provisions of section 106(3)." 17 U.S.C. § 109(a).

Nevertheless, the Ninth Circuit has concluded that making § 602(a) subject to § 109(a) would eviscerate the statute. Because most imported goods have already been first sold abroad, "[c]onstruing 109(a) as superseding the prohibition on importation . . . would render Sec. 602 virtually meaningless!" *BMG Music v. Perez,* 952 F.2d 318, 319 (9th Cir. 1991) (citation omitted), *cert. denied,* ____ U.S. ____, 112 S. Ct. 2997 (1992), Pet. App. 32.

By contrast, the Third Circuit has given meaning to both provisions by distinguishing between first sales by licensees and

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[3] Both §§ 109(a) and 602(a) list certain exceptions. Those of § 109 address rental situations, but do not mention § 602(a). 17 U.S.C. § 109(b) & (d). The exceptions in § 602(a) concern importation for governmental and private use and for scholarly, educational or religious purposes, but similarly do not mention § 109. 17 U.S.C. § 602(a)(1)-(3).

those by copyright owners themselves. *Sebastian*, Pet. App. 48 ("We do not confront a license agreement."); Pet. App. 44 ("The hearings revealed the copyright owners' desire to prevent importation . . . of copies made by licensees in foreign countries."). Under the Third Circuit approach, § 602(a) protects copyright owners from *unfair* competition by their licensees. It is not designed to protect them from *all* competition by expanding their copyright monopoly.

Until the present case, decisions in the district courts followed a dichotomy between first sales by licensees and those by the copyright owner. In licensee situations, §602(a) has been applied.[4] When the copyright owner or its affiliate has made the first sale, § 109 has been applied.[5]

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[4] *BMG Music, supra* (first sale in Mexico by licensee); *Columbia Broadcasting Sys., Inc. v. Scorpio*, 569 F. Supp. 47 (E.D. Pa. 1983), *aff'd without op.*, 738 F.2d 424 (3d Cir. 1984) (Philippine licensee); *T.B. Harms Co. v. Jem Records, Inc.*, 655 F. Supp. 1575 (D.N.J. 1987) (New Zealand compulsory licensee); *Hearst Corp. v. Stark*, 639 F. Supp. 970 (N.D. Cal. 1986) (United Kingdom publisher made first sale); *Nintendo of America, Inc. v. Elcon Indus., Inc.*, 564 F. Supp. 937 (E.D. Mich. 1982) (Japanese licensee); *Original Appalachian Artworks, Inc. v. J.F. Reichart, Inc.*, 658 F. Supp. 458 (E.D. Pa. 1987) (foreign licensee "not allowed to export to or distribute the goods in the United States"); *Selchow & Righter v. Goldex Corp.*, 612 F. Supp. 19 (S.D. Fla. 1985) (Canadian author had assigned away its U.S. rights).

[5] *Red Baron-Franklin Park, Inc. v. Taito Corp.*, 9 U.S.P.Q.2d (BNA) 1901 (E.D. Va. 1988), *rev'd on other grounds*, 883 F.2d 175 (4th Cir. 1989), *cert. denied*, 493 U.S. 1058 (1990); *cf. Cosmair, Inc. v Dynamite Enters., Inc.*, 226 U.S.P.Q (BNA) 344 (S.D. Fla. 1985) (goods both made and sold in United States by copyright owner).

Red Baron involved importation of circuit boards with a copyrighted video game and their subsequent use in a video arcade. On appeal, the Japanese copyright owner:

> conceded that the first sale provisions of section 109(a) of the Copyright Act permitted a U.S. arcade game operator to purchase, *in Japan*, a circuit board containing the [copyrighted] game *and to then import* the circuit board for insertion into a coin-operated arcade game in the United States.

(footnote continues)

B. Past Decisions on Enlarging Statutory Monopolies.

The Ninth Circuit's view of § 602(a) enlarges the statutory monopoly conferred by the Copyright Act. Section 602(a) becomes the only "right" of a copyright owner not "subject to sections 107 through 120," as are all other exclusive rights of a copyright owner. 17 U.S.C. § 106.

This Court's past decisions establish that when the statute is unclear, the patent and copyright laws should not be construed to enlarge the statutory monopoly. In *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), the Court reversed a Ninth Circuit ruling that VCR manufacturers committed contributory copyright infringement by selling home VCRs on which unauthorized copies of copyrighted works were reproduced. As here, the statute was unclear. The claim, thus, amounted to an attempt to "enlarge the scope of respondents' statutory monopolies . . . beyond the limits of the grants authorized by Congress." 464 U.S. at 421.

> In a case like this, in which Congress has not plainly marked our course, we must be circumspect in construing the scope of rights created by legislative enactment which never contemplated such a calculus of interests.

Id. at 431. "The Judiciary's reluctance to expand the protection afforded by [a] copyright without explicit legislative guidance is a recurring theme" in the Court's decisions. *Id.* (citations omitted).

This Court's patent decisions are also relevant. *See Sony,* 464 U.S. at 439 ("[H]istoric kinship [exists] between the patent

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(footnote continued)

H.R. Rep. No. 735, 101st Cong., 2d Sess. 9 (1990), *reprinted in* 1990 U.S.C.C.A.N. at 6940 (emphasis added). The Fourth Circuit, however, ruled that display of the game in a video arcade violated the copyright owner's right of "public performance." *Id.* In response, Congress in 1990 broadened § 109 to correct this "anomaly" of allowing sales (under the first sale doctrine) and then lawsuits "to prevent use of the circuit boards for their intended purpose." 1990 U.S.C.C.A.N. at 6940; *id.* at 6947.

and copyright law."). The Court has consistently ruled that patent rights must be "strictly construed." *Sears Roebuck & Co.,* 376 U.S. at 230. "Thus, the patent system is one in which uniform federal standards are carefully used to promote invention while at the same time preserving free competition." *Id.* at 230-31; *see United States v. Masonite Corp.,* 316 U.S. 265, 280 (1941) ("Since patents are privileges restrictive of a free economy, the rights Congress has attached to them must be strictly construed.").

In *Deepsouth Packing Co. v. Laitram Corp.,* 406 U.S. 518 (1972), the Court embraced what the respondent had called "too narrow and technical an interpretation of the statute . . . ."406 U.S. at 529. In addition, it invoked "this Nation's historical antipathy to monopoly and of repeated congressional efforts to preserve and foster competition" to reject an expansive view of patent rights. *Id.* at 530.

> It follows that we should not expand patent rights . . . on more than mere inference from ambiguous statutory language. We would require a clear and certain signal from Congress before approving the position of a litigant who . . . argues that the beachhead of privilege is wider . . . than courts had previously thought.

Id. at 531. The "sign of how far Congress has chosen to go can come only from Congress." *Id.* at 530.

Here, a claim for an enlarged statutory monopoly is again pitted against free competition principles in the context of an ambiguous statutory scheme. The Ninth Circuit has departed from the path charted by this Court's past decisions. It chose to resolve the unclear relationship between §§109(a) and 602(a) in favor of a broader copyright monopoly. It eschewed the precept that "the heart of our national economic policy long has been faith in the value of competition." *Standard Oil Co. v. Federal Trade Comm'n,* 340 U.S. 231, 248 (1950). These departures from this Court's past decisions, even without a conflict with the Third Circuit, should provide sufficient reason to grant the petition.

II. THE TWO QUESTIONS PRESENTED IN THE PETITION URGENTLY REQUIRE A NATIONWIDE RULE

The Court has recognized "[t]he purpose of Congress to have national uniformity in patent and copyright laws." *Sears Roebuck & Co.,* 376 U.S. at 231 n.7. Here, the lack of uniformity has created considerable uncertainty. In the Third Circuit (but not in the Ninth), retailers may freely purchase and resell goods with a copyrighted feature or label, if the copyright owner has already first sold the goods abroad (and reaped its reward). In the text of § 602(a) (but not in decisions of the Ninth Circuit), only the act of "importation" is proscribed, and those who do not import justifiably might consider themselves safe from liability.

The absence of a nationwide rule on these questions creates several untenable situations for *Amici* and their members. First, retailers are uncertain whether they may continue to purchase from customary sources of supply — especially from trading companies and vendors who purchase excess stocks for resale. If a product is imported and bears some copyrighted label or feature, an investigation into the origin of the product becomes critical under the Ninth Circuit rule. The "good faith purchaser for value" rule is not a defense to copyright infringement. *Pinkham v. Sara Lee Corp.,* 983 F.2d 824, 829 (8th Cir. 1992) (liability for copyright infringement is "absolute"). Even with investigation, the Ninth Circuit rule offers little solace. One may never truly know whether a particular shipment had been imported with the copyright owner's blessing and then sold to a trader as excess inventory — or is in a chain of title with an unauthorized importer. Conceivably, a single shipment could include a mixture of blessed and unblessed imports. There is no duty to include special markings on the goods, so that retailers may distinguish between different import channels.

Second, until there is a uniform rule, retailers will face a greater incidence of litigation (and almost certain defeat) in the Ninth Circuit. It is not for geographic convenience that East

Coast plaintiffs have sued some of the *Amici* in the Central District of California. *See Yee v. City of Escondido,* 503 U.S. 519, 112 S. Ct. 1522, 1534 (1992) (forum shopping is "of particular concern").

Third, merchandise stocking strategies are difficult to formulate without the commercial certainty of a nationwide rule. Ought a drug store chain, a nationwide catalog service, a discount department store or a home shopping network reduce the "shelf space" allocated to imports bearing some indicia of copyright? Should a buying department purchase only from domestic copyright owners and pay (and pass on) the higher prices inherent in having a single source of supply?

Such decisions are not the result of an explicit choice made by Congress in the text of the Copyright Act. They are instead the result of a divergent rule in the Ninth Circuit that has nationwide effects. Consumer choice, price competition, the supply of imported goods with copyrighted labels, and the free movement of such goods are affected by distribution systems that are not coterminous with the geographic lines of the Ninth Circuit.

CONCLUSION

For the above reasons as well as those stated in the petition, the Court should grant the petition.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DISENOS ARTISTICOS E INDUSTRIALES, S.A., and LLADRÓ, U.S.A., INC., Plaintiffs, v. COSTCO WHOLESALE CORPORATION, Defendant.	CASE NO. 93-7061 RAP (JGx) JUDGMENT

The Court having entered on December 15, 1994 an order adjudicating the parties' motions for summary judgment on the issues of liability and entitlement to equitable relief, and the Court having entered the parties' subsequent stipulation and order regarding the amount of damages and other monetary relief,

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

1. That defendant Costco Wholesale Corporation, its agents, employees, and any persons acting on behalf of or in concert with it, are hereby permanently enjoined from importing, selling, advertising, marketing, trading, or otherwise distributing in the United States any and all copyrighted Lladró figurines, except figurines imported into the United States by Lladró USA or any other person having the copyright owner's authority to import.

2. That Plaintiffs Disenos Artisticos E Industriales, S.A., and Lladró U.S.A., Inc., shall recover from defendant Costco Wholesale Corporation the sum of $310,000 for damages, fees, costs, and other monetary compensation and relief.

Dated: January 12, 1995

/s/ Richard A. Paez

UNITED STATES DISTRICT JUDGE

Disenos Artisticos, Etc. v. Costco Wholesale Corporation, C.D. Cal. No. CV 93-7061-RAP (appeal pending)

Excerpts From the Court's Findings of Fact and Conclusions of Law Dec. 14, 1994

FINDINGS OF UNDISPUTED FACT

1. Plaintiff Disenos Artisticos E Industriales, S.A. ("DAISA") is a Spanish corporation with its principal place of business in Valencia, Spain. Pretrial Order ¶1(a).

2. Plaintiff Lladró U.S.A., Inc. ("Lladró USA") is a New Jersey corporation with its principal place of business at 1 Lladró Drive, Moonachie, New Jersey. Pretrial Order ¶1(b).

* * *

4. DAISA and Lladró USA, through intermediaries, are both wholly owned by Lladró Comercial, S.A., a Spanish corporation. Pretrial Order ¶5(a).

* * *

23. Costco has never imported Lladró figurines into the United States. Pretrial Order ¶5(ah).

24. Costco has obtained all Lladró figurines which it sold from four vendors whose offices are within the United States. All of Costco's transactions with those vendors occurred within the United States. Pretrial Order ¶5(ai).

* * *

CONCLUSIONS OF LAW

* * *

5. Costco's sale in its retail outlets of copyrighted Lladró figurines imported into this country without Plaintiffs' authorization violates Section 602(a). *Parfums Givenchy, Inc. v. Drug Emporium, Inc.*, Nos. 92-56359, 93-55050, slip op. at 12949-50 (9th Cir. Oct. 21, 1994) ("*Drug Emporium*").

6. Costco's violation of Section 602(a) is not excused by the "first sale doctrine" set forth at Section 109(a) of the Copyright Act, 17 U.S.C. 109(a). *Drug Emporium*, slip op. at 12947-48; *BMG Music v. Perez*, 952 F.2d 318, 319 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 2997 (1992).

7. After careful review, the Court enters summary judgment as a matter of law in favor of Plaintiffs on the issues of liability and equitable relief.

* * *

DATED 12/14/94

/s/ Richard A. Paez

RICHARD A. PAEZ
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SWAROVSKI AMERICA LIMITED, Plaintiff, v. COSTCO WHOLESALE CORP., Defendant.	CASE NO. CV 93-6365 SVW (SHx) CASE NO. CV 93-7403 SVW (SHx) (Consolidated)
SWAROVSKI AMERICA LIMITED, Plaintiff, v. PRICE/COSTCO INC. AND THE PRICE COMPANY, Defendants.	STIPULATION, ORDER AND FINAL JUDGMENT

STIPULATION, ORDER AND FINAL JUDGMENT
[EXCERPTS]

Plaintiff Swarovski America Limited and Defendants Costco Wholesale Corp., Price/Costco Inc. and The Price Company (collectively, "Defendants"), hereby stipulate that they have reached a settlement that provides for the entry of this judgment and order ("Order") and its future vacation if there is a change in the law as set forth in paragraph 9 below. The parties, having thus consented to this Order,

IT IS ORDERED AND DECREED:

* * *

3. Defendants are and shall be permanently enjoined from:

a. importing or knowingly causing to be imported into the United States, or ordering or knowingly

causing to be ordered from outside the United States for shipment into the United States, any copyrighted SWAROVSKI SILVER CRYSTAL figurines; and

b. . . . selling or otherwise distributing or knowingly causing to be sold or otherwise distributed in the United States any copyrighted SWAROVSKI SILVER CRYSTAL figurines which were imported into the United States without the authorization of Plaintiff Swarovski America Limited or any successor in interest, in whole or in part, with respect to the copyrights in such figurines or without the direct and express authorization of the owner of copyright.

* * *

8. The Court shall retain jurisdiction to enforce compliance with the terms of this Order or to vacate this Order under Paragraph 9 hereof.

9. a. If the Supreme Court of the United States determines, or if the Court of Appeals for the Ninth Circuit in an action which is not subject to further review determines, or if a subsequent act of Congress provides, (i) that the first sale doctrine applies to goods first sold outside the United States by the copyright owner, its affiliates or others, in actions brought under 17 U.S.C.§602(a) or (ii) that nonimporting retailers cannot be liable under 17 U.S.C.§602(a) or are not so liable if they have not aided, abetted, participated in, had knowledge of or had reason to know of the unauthorized importation, Defendants may move this Court within three months of such a determination to vacate this Order. Plaintiff will not oppose the motion to vacate the Order if Plaintiff determines that either of the circumstances listed above has occurred.

b. Defendants may also move to vacate (i) on grounds of any change in the controlling law of this Circuit with respect to 17 U.S.C.§602(a) if the change would affect the outcome of the actions, or (ii) as permitted under Fed. R. Civ. Proc. 60.

* * *

Dated: December 21, 1994

/s/ Stephen V. Wilson

United States District Judge

MEMBERS OF NATIONAL ASSOCIATION OF CHAIN DRUG STORES

Albertson's, Inc.
American Drug Stores, Inc.
Andorra Pharmacy Inc.
Arbor Drugs, Inc.
Ark Drugs
The Arrow Corporation/ Arrow Prescription Centers
Arthur Drug Stores Inc.
The Bartell Drug Company
Big B, Inc.
Big Bear Stores
Buffalo Pharmacies
CRX Pharmacy
CVS
Carle RX Express
Carrs Quality Centers
City Drug Stores Inc.
City Drugs
Clover Stores
Concord Drugs, Inc.
Corner Drug Stores
D & W Pharmacies, Inc.
Davidson Drugs, Inc.
Discount Drug Mart, Inc.
Downeast Pharmacy, Inc.
Drug Barn Inc.
Drug Emporium, Inc.
Drug Fair Stores of NJ
Drug World Pharmacies
Drugtown Drugstores
Duane Roade
Eckerd Corporation
Emm-Dee Drug Corporation
F & M Distributors, Inc.
Fay's Incorporated
Fedco Professional Pharmacies
Fedco, Inc.
Fred's Inc.
Freedom Drug Inc.
Fruth Pharmacy
Genovese Drug Stores, Inc.
Giant Eagle, Inc.
Giant Food Inc., Pharmacy Div. Giant Discount Drug
Grand Union Company
Gresham Drugs, Inc.
H-E-B Foods/Drugs Inc.
Haggen, Inc.
Happy Harry's Discount Drugs
Harco Drug Inc.
Harmon Discount Stores
Hartig Drug Stores
Health Care Professionals
Hi-School Pharmacy Inc.
Horton and Converse Pharmacies
Hyde Drug, Inc.
I got it at Gary's
Joel N' Jerry's
Judd Drugs, Inc.
K&B Services, Incorporated
Keltsch Bros. Inc.
Kerr Drug Stores, Inc.
Keystone - Medicine Chest Pharmacies
Kinney Drugs, Inc.
Kmart Corporation
Knight Drugs Inc.
Kopp Drug Inc.
Kurtz Pharmacy, Inc.
Lewis Drugs, Inc.
Longs Drug Stores

Marc Glassman Inc.
Marsh Drug Stores, Inc.
Maxi Drug, Inc.
May's Drug Stores, Inc.
McKay Drugs
Med-X Corporation
Medic Discount Drug
Medical Center Pharmacy
Medicap Pharmacies, Inc.
Medicine Shoppe International, Inc.
Medisave Pharmacies
Meijer, Inc.
Monahan Pharmacy Inc.
Navarro Discount Pharmacies
NeighborCare Pharmacies
Nelson's Drug Stores
Northtowne Pharmacy, Inc.
Osborn Drugs, Inc.
Super Save Drugs/Owl Pharmacies, Inc.
Parkway Drugs
Pathmark Stores, Inc.
Pelton's Drug Stores
Perry Drug Stores, Inc.
Phar-Mor, Inc.
Pharmhouse, Corp.
Pic 'N Save Drug Co., Inc.
The Price Company
Price-Less Drug Stores, Inc.
Quick Chek Food & Pharmacy
Reasner Drugs, Inc.
Retired Persons Services, Inc.
Revco D.S., Inc.
Rite Aid Corporation
Ritzman Pharmacies, Inc.
Rock Bottom Stores, Inc.
The Rx Place
Rx Plus
RxD Pharmacies, Inc.
Safeway, Inc.
Sav-On Drugs, Inc.
Save Mart Supermarkets
Seaway Food Town, Inc.
Service Discount Food & Drugs Inc.
Shelly's Pharmacy #1, Inc.
Shop 'N Save Food and Drug Superstores
Shopko Stores, Inc.
Smith's Food and Drug Centers
Smitty's Super Valu, Inc.
Snyder Drug Stores, Inc.
Super D Drugs Inc.
SUPERVALU Pharmacies, Inc.
Target Stores, A Div. of Dayton-Hudson Corp.
Taylor Drug Stores, Inc.
Thrift Drug, Inc.
Thriftway Drugs
Thrifty PayLess, Inc.
Thrifty Drug Stores, Inc. dba Thrifty White Drug, Inc.
Thrifty Drugs of Hawaii
Valco Drug Stores
The Vons Companies, Inc.
Wakefern Food Corp./ ShopRite
Wal-Mart Stores, Inc.
Walgreen Co.
Weatherwax Drug Stores
White Shield, Inc.
L. F. Widmann, Inc.